IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-688

CHICAGO TYPOGRAPHICAL UNION NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HAMMOND PUBLISHERS, INC.,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, Chicago Typographical Union No. 16, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding on June 21, 1976 and rehearing denied on August 18, 1976.

OPINIONS BELOW.

The Decision of Administrative Law Judge Jerry B. Stone was entered July 10, 1974 and is reproduced in Appendix A.

The Decision and Order of the National Labor Relations Board, overruling the Administrative Law Judge, entered on March 6, 1975, with the dissent of Member John H. Fanning, is reproduced in Appendix B. The decision of the National Labor Relations Board is reported at 216 NLRB No. 149.

The Judgment, without opinion, of the Court of Appeals for the District of Columbia was entered on June 21, 1976 and is reproduced in Appendix C. An Order of the Court of Appeals denying rehearing, entered on August 18, 1976, is reproduced in Appendix D.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States rests on Title 28 United States Code § 1254(1).

QUESTIONS PRESENTED.

1. Is it a violation of Section 8(b)(1)(B) of the Labor-Management Relations Act, Title 29 United States Code, Section 158, for a labor organization to fine and/or expel a member, who is a "supervisor" within the meaning of the Act, for crossing a picket line in connection with a protected work stoppage by fellow members and employees when one or more of the following conditions are present:

a) The "supervisors" have been members of the bargaining unit recognized under succeeding collective bargaining agreements between the labor organization and employer;

b) By collective bargaining agreement, one of the supervisors was required to be a member of the labor organization, as a condition of employment within the recognized bargaining unit;

c) There is no evidence that the supervisors were required by the employer to cross the picket line as a condition of their continued employment;

d) The primary function of the supervisors, in crossing the picket line, was not to engage in collective bargaining or grievance adjustment, but to maintain the flow of bargaining unit work during the course of the work stoppage;

e) The only reason for the fine and/or expulsion was in response to the action of the supervisors in crossing the picket line and the failure and refusal of the supervisor members to attend the trial committee hearing of the labor organization or pursue available appeal procedures within the labor organization; and/or

f) The labor organization has taken no action to enforce collection of the fines.

2. Is it an unconstitutional interpretation and application of the Labor-Management Relations Act to hold that a labor organization may not fine and/or expel a voluntary member for simply crossing a legal picket line of the organization solely because he is a "supervisor" within the meaning of the Act?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . ."

Title 29, United States Code, Section 158(b)(1)(B):

> "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. . . ."

Title 29, United States Code, Section 164(a):

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

STATEMENT OF THE CASE.

The Finding of an Unfair Labor Practice.

The Petitioner herein, Chicago Typographical Union No. 16 (hereinafter referred to as the "Union") is the respondent in an unfair labor practice charge initiated by Hammond Publishers, Inc., the Intervenor herein (hereinafter referred to as the "Employer"). The Respondent is the National Labor Relations Board. Pursuant to the aforesaid charge the National Labor Relations Board in a divided decision found that the Union had violated Section 8(b)(1)(B) of the Labor-Management Relations Act by fining and expelling from membership two supervisory employees of the Employer following the employees crossing of a peaceful picket line maintained by the Union in response to an economic lockout initiated by the Employer.

The Decision of the Administrative Law Judge.

A complaint was issued against the Union by the General Counsel of the Board prior to the Supreme Court's decision in *Florida Power and Light Co.* v. *International Brotherhood of Electrical Workers*, 416 U. S. 790 (1974). The decision of Administrative Law Judge Stone followed *Florida Power and Light Co., supra.*

Succinctly stated, the Administrative Law Judge recommended that the complaint against the Union be dismissed upon his finding that the sole reason for the Union's action in fining and

expelling the supervisor members was their crossing a legal picket line established by the Union. There was no evidence that the Union's action was either in response to an order by the Employer that the supervisors either return or remain in active employment during the stoppage or an attempt to control or influence the Employer's selection of representatives for collective bargaining or grievance adjustment. Under these circumstances, Judge Stone applied the Supreme Court's reasoning in *Florida Power & Light Co.* that the intent of Congress in passing the Taft-Hartley amendments to the National Labor Relations Act was not to control union membership of supervisors through the broad application of the unfair labor practice procedure of Section 8(b) of the amended Act, but, rather, through the proviso contained in Section 14.

The Decision of the Majority of the National Labor Relations Board.

Three members of the Board, Howard Jenkins, Jr., Ralph E. Kennedy, and John A. Penello, constituted the majority in this case. John A. Kennedy no longer is a member of the Board. Member John H. Fanning dissented.

The majority declined to follow Judge Stone's decision. Although not disputing the essential facts found by the Administrative Law Judge, the majority members of the Board held to a different reading of *Florida Power & Light Co.* Although the two supervisors subject to the fine and expulsion were admittedly responsible for maintaining production in the area affected by the work stoppage, the majority determined that the actual hand work performed by the men was minor during the stoppage. The supervisors were responsible for monitoring, maintaining and training individual "strikebreakers" on sophisticated computerized equipment which the Employer made operational concurrent with the commencement of the work stoppage, the stoppage which took the form of an employer "lockout" in response to an impasse in negotiations for a new

collective bargaining agreement. However, the majority determined that such work by the members, although not directly related to representation in the collective bargaining process or grievance adjustment, was inherently supervisory in nature. The majority then concluded that any effort on the part of the Union to discipline or expel the men, under these circumstances, interfered with the Employer's selection of its representatives, as set forth in Section 8(b)(1)(B) of the Act.

The Dissenting Opinion of Member Fanning.

Member Fanning, in his dissent, stressed the practical realities of the situation that gave rise to the work stoppage and picket line. The core of the collective bargaining impasse was the Employer's intention to revolutionize its composing room operations (the jurisdiction of the affected bargaining unit) by the introduction of computerized typesetting equipment and its immediate impact on the maintenance of employment for senior employees. The bargaining deadlock was on the extent of job guarantees for the older employees upon the introduction of the new technology. The parties were unable to agree. The Employer declared an impasse, ordering members of the bargaining unit to leave the Company's premises or submit to the new computerized operation. The effect was a lockout.

Member Fanning underscored the key role played by the two supervisors in immediately making the computerized equipment operational, simultaneous with the lockout, and maintaining the equipment during the ensuing years of the work stoppage. As Member Fanning saw the situation, the action of the Union could not be construed as an effort by the Union to interfere with the selection of a management representative, as contemplated by Section 8(b)(1)(B) of the Act; rather, the supervisors' activities were basic to the rank-and-file work which had been performed by the union members prior to the work stoppage.

The Decision of the Court of Appeals.

The Court of Appeals did not hear oral argument and issued no opinion. The Court of Appeals simply issued a judgment, affirming the decision of the Board majority. A similar *per curiam* order was entered, subsequently, denying the request for rehearing. In this regard, note is made of the Supreme Court's comments on the precedential effects of summary dispositions of appeals in *Sidle* v. *Majors*, ____ U. S. ____, 45 L. W. 3343 (1976). We refer also to the comments, appearing in this regard, in *District Lawyer*, Fall Issue (1976) Alan B. Morrison, "Decisions Without Reasons: A Crisis in the DC Circuit".

REASONS FOR GRANTING THE WRIT.

I.

THE SCOPE OF THE SUPREME COURT'S DECISION IN FLORIDA POWER & LIGHT CO. IS SUBJECT TO VARYING INTERPRETATIONS AND APPLICATIONS AMONG MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD AND JUDGES OF THE UNITED STATES COURTS OF APPEALS.

The central issue raised by this Petition is the scope and meaning of the Supreme Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, supra.* The subject Board decision appears to run directly counter to the position held by the U. S. Court of Appeals for the Ninth Circuit in *NLRB* v. *Typographical Union, Local 21*, 486 F. 2d 1347 (C. A. 9, 1973), *cert. denied* 418 U. S. 905.

In *Florida Power and Light Co.*, the Supreme Court of the United States held that a labor organization did not commit an unfair labor practice by taking disciplinary action against union

members who crossed the union's picket line during the course of a strike, although the union members were supervisors as that term is defined in the Act. In the Supreme Court's decision there is reference to the fact that the supervisor members performed some (the amount of which was not defined in the decision) non-supervisory bargaining unit work during the course of the work stoppage. The holding of the Supreme Court, following review of the congressional history surrounding the Taft-Hartley amendments, was that the intent of Congress was to allow employers the right to sanction or prohibit union membership on the part of their supervisors. The Supreme Court also concluded on the other hand that the guarantee contained in Section 14 of the Labor-Management Relations Act that supervisors may be union members, demonstrates the intent of Congress that control over supervisors lies at the discretion of the employer but not by way of unfair labor practice proceedings against a labor organization.

The majority of the NLRB in the subject case has interpreted the Supreme Court's decision as prohibiting the equal treatment of supervisory members with other employee members by a labor organization in connection with a legal work stoppage unless the supervisors perform a continuing and substantial amount of direct hand or craft work. The NLRB's decision runs counter to the express holding of the Ninth Circuit which was denied certiorari by the Supreme Court on the same day that the Court decided *Florida Power and Light*, June 24, 1974. The Ninth Circuit's decision on this point is almost identical in sum and substance to the view of the Administrative Law Judge in the subject case:

> "The Union's punishment of the strikebreakers presents a different issue. Although Robert and Earl Dixon and Ernest Fingerlos were supervisors, the Union did not punish them for exercising any management duty.
>
> These three men refused to honor the picket line of their Union, and there is no reason to treat them differently than

> nonsupervisors. The Journal's right to select management representatives under Section 8(b)(1)(B) is not affected by the Union's action.
>
> In Allis-Chalmers, the Supreme Court said that '[t]he economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its own terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . . ."' Id. at 181, 65 LRRM at 2451. Here, the Board's broad interpretation of Section 8(b)(1)(B) threatens that power. It is an unjustifiable extension of the limited language of Section 8(b)(1)(B). Had the members elected to resign from the Union, the power of the Union over them would have ended. NLRB v. Granite State Joint Board, etc., 409 U.S. 213, 81 LRRM 2853, 41 LW 4074 (U.S. Dec. 7, 1972). But here the members remained in the Union, and therefore continued to be subject to their obligations as members." (83 LRMM at p. 2315.)

The Board's decision, if sustained, runs not only counter to the decision of the Ninth Circuit and what we believe to be the correct interpretation and application of *Florida Power & Light*, but is not consistent with the reality of those craft industries that have long operated through a journeyman-apprenticeship system. Many employees in such craft industries may, in connection with the day-to-day assignment or training of less experienced employees or apprentices, have some of the earmarks of "supervision" which are usually found in an unskilled or semi-skilled industrial setting. But the line between the journeyman and the immediate supervisor in a craft system is a thin one. This fact was reflected in the bargaining relationship at the subject Employer, which had always accepted the so-called journeyman foreman as being part of the bargaining unit and covered under the collective bargaining agreement. In fact, one of the supervisors was part of the locked out employees at the commencement of the stoppage. Note, also Judge Swygert's dissent in *Wisconsin River Valley District Council of Carpenters* v. *NLRB*, 532 F. 2d 51 (C. A. 7, 1976).

II.

A SERIOUS QUESTION IS RAISED CONCERNING THE EXTENT OF LIMITATION ON THE CONSTITUTONAL RIGHT OF FREE ASSEMBLY BY THE TAFT-HARTLEY AMENDMENTS.

The Board concluded, we believe incorrectly, that although one of the supervisors was a voluntary member of the labor organization and the other was a member through agreement and within the scope of the bargaining unit, the Union is prohibited from treating them equally as other members. The Supreme Court of the United States has recognized that the inclusion of supervisors within the scope of a bargaining unit or required union membership is a permissive area of negotiations under the Labor-Management Relations Act, *NLRB* v. *News Syndicate Co.*, 365 U. S. 695 (1961).

There can be no dispute that both a labor organization and employes who have supervisory status as that term is defined in the Labor-Management Relations Act, have the constitutional right, under the First and Fifth Amendments to the Constitution of the United States, to continue their union membership. It has been assumed that the constitutional right did not extend to protecting such employees from employer discrimination of retaliation against them for union membership unless the employer voluntarily agreed otherwise with the labor organization. *NLRB* v. *Budd Manufacturing Co.*, 169 F. 2d 571 (C. A. 6 1948). The effect of the subject decision and the Board's restrictive interpretation of *Florida Power & Light* and rejection of the Ninth Circuit's view is to seriously erode that constitutional right and extend the employer's private right of action to interference with the operation of a voluntary association and its members. On the one hand, a supervisor may be free to abandon his membership prior to the Union's action against him, and on the other, the Employer is under no legal obligation to include a supervisor within the bargaining unit and Union membership.

Once having engaged in those voluntary acts, a majority of the NLRB and one Court of Apeals, in effect would now hold that the employer can disavow those voluntary actions through the process of involving the federal government through unfair labor practice proceedings, in limiting the constitutional rights of free speech and assembly guaranteed a labor organization and its members and presumably reinforced by the Congress by passage of Section 14 of the Labor-Management Relation Act. In this regard, we note the decision of the Supreme Court of the United States in *Beasley* v. *Food Fair, Inc.*, 416 U. S. 653 (1974), in reasserting supervisors' constitutional right to maintain union membership and employer's private right to discharge for such membership.

The constitutional issue is particularly relevant to the failure of the Board and the Court of Appeals to consider any distinction between the imposition of a fine and expulsion from union membership. The effect of the broad ruling of the Board majority is not only to control the membership responsibility of a voluntary organization, but to require the association to retain unwanted members who choose to disavow the organization and are not dependent upon the union's representation of their interests.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit and the opinion of the National Labor Relations Board.

Respectfully submitted,

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APPENDIX.

UNITED STATES OF AMERICA,
BEFORE THE NATIONAL LABOR RELATIONS BOARD,
Division of Judges,
Washington, D. C.

CHICAGO TYPOGRAPHICAL UNION No. 16 and HAMMOND PUBLISHERS, INC. *William G. Kocol* and *March M. Pekay, Esqs.*, for the General Counsel. *Joel H. Kaplan, Esq.* and *Michael J. Rybicki, Esq. (Seyfarth, Shaw, Fairweather and Geraldson)*, of Chicago, Ill., for the Charging Party. *Gilbert A. Cornfield, (Kleiman, Cornfield and Feldman)*, of Chicago, Ill., for the Respondent.	Case No. 13-CB-5060 13-CB-5157

DECISION.

STATEMENT OF THE CASE.

Jerry B. Stone, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, commenced as a proceeding involving Case 13-CB-5060, and was tried pursuant to due notice on January 8, and 9, 1974, at Chicago, Illinois. On February 14, 1974, the General Counsel moved that the undersigned in his discretion, reopen the proceeding in Case 13-CB-5060, consolidate such with Case 13-CB-5157, and that further hearing be held on the issues in Case 13-CB-5157. The Respondent opposed the General Counsel's motion for reopening and consolidation of cases, averred a willingness to stipulate the record in Case 13-CB-5060 in the case involving 13-CB-5157 and averred a willingness that the same Administrative Law Judge (the undersigned) who

heard and decided Case 13-CB-5060, hear and decide Case 13-CB-5157. Briefs having already been filed in Case 13-CB-5060, and the case therefore being ready for reasonably prompt decision, the undersigned, on February 28, 1974, in his discretion, denied the General Counsel's motion for reopening and consolidation of cases because such would unduly delay issuance of the decision with respect to Case 13-CB-5060. The General Counsel on March 12, 1974, filed with the Board a request for special permission to file an interim appeal to the Order of February 28, 1974. The Board on March 18, 1974, granted the General Counsel's request for interim appeal and reversed the denial of General Counsel's motion for reopening of record and consolidation of cases. Therefore, said consolidated proceeding (Cases 13-CB-5060 and 13-CB-5157) was tried pursuant to due notice on May 7, 1974.

The charge in Case 13-CB-5060 was filed on October 24, 1973. The complaint in Case 13-CB-5060 was issued on November 30, 1973. The issues concerned whether Respondent has violated Section 8(b)(1)(B) of the Act by expelling from membership and fining Norman E. Andress, a supervisor of Hammond Publishers, Inc.

The charge in Case 13-CB-5157 was filed on January 14, 1974. The complaint in Case 13-CB-5157 was issued on February 14, 1974. The issues concern whether Respondent has violated Section 8(b)(1)(B) of the Act by expelling from membership and fining Vernon Palmer, a supervisor of Hammond Publishers, Inc.

All parties were afforded full opportunity to participate in the proceeding. Briefs were filed by all of the parties with respect to Case 13-CB-5060 on or around February 11, 1974, and have been considered. Briefs and/or Post Hearing Statements were filed by all parties with respect to the consolidated cases (13-CB-5060 and 5157) on or about June 4, 1974, and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact.

I. *The Business of the Employer.*

The facts herein are based upon the pleadings and admissions therein.

Hammond Publishers, Inc., the Charging Party, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of the laws of the State of Indiana.

The Charging Party, at all times material herein, has maintained its office and place of business at 417 Fayette Street, Hammond, Indiana, and has been, at all times material herein, engaged in the business of newspaper publishing.

During a representative calendar year period, the Charging Party, in the course and conduct of its publishing operations, held membership in, or subscribed to, various interstate news services, including, but not limited to, United Press International and Associated Press; published various syndicated features, including, but not limited to, Hopkins Syndicate, United Press International and Copley News Service; advertised various nationally sold products, including, but not limited to, those of Chrysler Corporation, General Motors and Ford Motor Company; and derived gross revenues from said publishing operations in excess of $200,000.

As conceded by Respondent and based upon the foregoing, it is concluded and found that Hammond Publishers, Inc., is, and has been at all times material herein, an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that in connection with the conduct described in section III herein, it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. *The Labor Organization Involved*[1]

Chicago Typographical Unnio No. 16 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

1. The facts are based upon the pleadings and admissions therein.

III. *The Unfair Labor Practices.*

A. Preliminary Issues

Agency Status[2]

At all times material herein, the following-named persons occupied positions set opposite their respective names, and have been, and are now, agents of the Chicago Typographical Union No. 16, acting on its behalf, within the meaning of Section 2(13) of the Act:

Fred Hunt, Jr.	President
Dave Donovan	Vice-president
Joe Casper, Jr.	Organizer
Henry Rosemont	Trial Committee Member
Charles Derby	Trial Committee Member
George F. Balfe	Trial Committee Member[3]
Stanley Bozenski	Trial Committee Member
Edward C. Billman	Trial Committee Member
Walter Kugarzak	Trial Committee Member
Joseph Janek	Trial Committee Member

B. The Collective Bargaining Representative Status[4]

Chicago Typographical Union No. 16, the Respondent, has been at all times material herein the recognized collective-bargaining representative of certain employees of Hammond Publishers, Inc.[5]

2. The facts are based upon the pleadings and admissions therein.

3. Balfe and Bozenski served only as trial committee members with respect to the Union's proceedings relating to Address. Kubarzak and Janek served only as trial committee members with respect to the Union's proceedings relating to Palmer.

4. The facts are based upon the pleadings and admissions therein.

5. For the purposes of this case it may be said that such employees are employees who worked in the composing room.

C. Norman E. Andress, Employer's Representative for Collective Bargaining.

The General Counsel alleges in his complaint that "at all times material herein, Norman E. Andress, production manager, has been and is now, an agent of the Charging Party, acting on its behalf, a supervisor within the meaning of Section 2(11) of the Act, and a representative of the Charging Party for purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act."

It is noted that the "Charging Party" referred to in the complaint is Hammond Publishers, Inc. There is no dispute that Andress was and is a supervisor of Hammond Publishers, Inc., within the meaning of Section 2(11) of the Act. Respondent's answer does not so dispute, and stipulations and statements of counsel reveal that such status is not disputed. Further, the credited testimony of Lewis and Andress and the foregoing reveal that Andress is production manager and may be described as a top level supervisor of Hammond Publishers, Inc., at all times material herein. Accordingly, it is concluded and found that Andress is a supervisor of Hammond Publishers, Inc. within the meaning of Section 2(11) of the Act.

Under Board law such a finding supports the further finding that Andress is a representative of Hammond Publishers, Inc. for the purposes of collective bargaining or the adjustment of grievances. The facts in this case involve a conflict between the Respondent and the Union concerning the work and collective bargaining conditions of employees in the composing room of Hammond Publishers, Inc. The facts[6] reveal that Andress has been and is a representative for purposes of collective bargaining and adjustment of grievances of employees in the composing room and other departments. Thus, Andress has participated as such representative of Hammond for collective bargaining with respect to bargaining units other than the composing room em-

6. The facts are overwhelming and essentially revealed by a composite of the credited aspects of the testimony of Andress and Lewis.

ployees. Andress has also participated as a representative for the purposes of collective bargaining and adjustment of grievances in a direct manner related to the composing room employees in participation on a joint standing committee composed of union and management representatives, in participation concerning grievances about action of the foreman of the composing room employees, and in handling grievances concerning air conditioning and related problems.

The Respondent contends that Andress is not a representative of Hammond Publishers, Inc., for the purposes of collective bargaining and adjustment of grievances with respect to the composing room employees. This contention is rejected since Board law is clear that Andress' status as a supervisor within the meaning of Section 2(11) of the Act constitutes him to be a representative for collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.[7] Further, were it necessary, such finding and conclusion would be required by his actual exercise of such responsibilities as set forth above. Accordingly, I conclude and find that Norman E. Andress is production manager of Hammond Publishers, Inc., and was and is a supervisor of Hammond within the meaning of Section 2(11) of the Act, and was and is a representative of Hammond within the meaning of Section 8(b)(1)(B) of the Act.

D. Norman E. Andress' Membership in Respondent's Union[8]

Norman E. Andress, as of August 23, 1973, had been a member of the Respondent's Union for many years. The collective bargaining agreement between the Union and Hammond Publishers, Inc., did not require that Andress be a union member. Nor is there any evidence that the Union, by pressure upon the Employer (Hammond Publishers, Inc.) or Andress, attempted to require that Andress maintain his membership in the Union.

7. *Operating Engineers, Local 501 (Anheuser Busch, Inc.)*, 199 NLRB No. 91.

8. The facts are undisputed.

The Union has various types of membership and bases dues upon the type of status. Andress' membership status was that of a person not working at the trade. By virtue of such status, Andress did not have the right to vote concerning collective bargaining problems between the Union and Hammond Publishers, Inc. Essentially, Andress' status allowed him to enjoy certain insurance or mortuary benefits.

Andress continued to be a union member until he was expelled on November 25, 1973. His expulsion and fining at that time are the crux of the issues in this case concerning him.

The Union by question and evidence raised questions as to whether Andress properly belonged in the status of "not working in the trade." Whether Andress' status was proper or not is not a relevant issue in this case. The facts clearly reveal that the Union's fining and expulsion of Andress were not based upon an alleged failure to notify the Union of change of status or upon an alleged failure to pay proper dues.

E. The Events of August 23, 1973.[9]

The Respondent and Hammond Publishers, Inc., were in negotiations for a new contract during the months preceding August 23, 1973. Around July 26, 1973, Hammond presented a "final offer" concerning contract terms and told the Respondent in effect that if such terms were not accepted, Hammond intended to put in effect certain changed conditions and rules. On August 20, 1973, the Respondent informed Hammond that the Company's terms were rejected. Thereupon, Hammond informed the composing room employees, in effect, that certain changes in working conditions would be made and that such employees would have to perform work of a type not previously performed.

As a result of this, the composing room employees ceased to work for Hammond on August 23, 1973. Hammond describes the situation as a work stoppage or strike. The Respondent

9. The facts are not in dispute except as to characterization thereof.

describes this situation as a lockout.[10] In any event, the Respondent's members ceased working and commenced picketing on August 23, 1973. Such activity was continuing at the time of the trial of this matter on January 8 and 9, and May 7, 1974.

F. Norman E. Andress' Activity August 23, 1973, and thereafter.

The General Counsel alleged in his complaint that "during the aforementioned work stoppage, Norman E. Andress worked and/or supervised the performance of work on the premises of the Charging Party on behalf of the Charging Party."

The Respondent's answer indicates lack of knowledge of the facts alleged excepting to the extent of awareness that Norman E. Andress on August 24, 1973, and thereafter crossed picket lines established by the Union in response to the "lockout" and remained on the premises during what prior thereto had been normal working hours.

The facts are clear, and I credit Andress' testimony to the effect that he worked and/or supervised the performance of work of employees in Hammond's various departments, including the composing room on August 23, 1973, and thereafter.

The facts to the foregoing extent are not in real dispute. There is dispute raised by the Respondent's contentions as to whether Andress engaged in "bargaining unit" work of a nonsupervisory type to a substantial degree.

As far as Andress' demeanor as a witness has a bearing, I note, he appeared to be a frank, forthright, and candid witness. Andress testified to the effect that during the first several weeks he was on the premises virtually around the clock, that during a 24-hour period he spent approximately 30 minutes of his time engaged in what may be described as manual work of handling tapes, etc. Andress' testimony was to the further effect that he

10. Hammond's counsel stated with respect to the issue that the composing room employees refused to perform the work and were asked to leave. For the purposes of this case, specific details as to whether the employees refused to work, were asked to leave, were locked out, or struck, are not important.

gave much instruction, answering questions and giving on-the-spot answers or demonstrations of how to operate equipment. Andress' testimony was to the further effect that new equipment (some of a computer type) was used, certain procedures eliminated, and that the employees worked longer periods of time per day. Thus, certain local ads which were already marked were not remarked. Certain "wire" stories were used on a straight basis. Certain editing or proofing of materials was eliminated.

Prior to the events of August 23, 1973, Hammond had approximately 110 employees working in its composing room. For the first few days or weeks thereafter, Hammond had some 10 employees working in the composing room with some functions being performed in other areas of its facilities. This number of employees ultimately expanded to around 30 employees.

The Respondent contends in effect that because of the variance between the number of employees (110) working for Hammond prior to August 23, 1973, and the 10 to 30 employees working thereafter, that Andress' testimony to the effect that his actual engaging in nonsupervisory work was minimal is unbelievable.

I find it unnecessary to make a determination as to whether Andress engaged in manual bargaining unit work, engaged in such work on a substantial or minimal basis, or only engaged in supervisory type work. As indicated later herein, I find it clear that the Respondent's motivation in finding and expelling Andress from the Union was simply because it wanted to keep anyone (employee or supervisor) from working for the Respondent.[11]

G. Restraint and Coercion Re: Norman E. Andress.

The following excerpts from a stipulation of the parties essentially reveal Respondent's acts toward Andress and the Employer.

• • • • •

11. Thus, it is not material to the findings herein to determine whether or not Andress engaged in nonsupervisory work.

STIPULATION.

It is hereby stipulated and agreed that:

At Respondent's regular Union meeting held on August 26, 1973, the Respondent instructed Joe Casper, Organizer, to prefer charges against Norman E. Andress.

On September 11, 1973, Joe Casper, Organizer, preferred charges against Norman E. Andress for "ratting".

At Respondent's regular Union meeting held on September 30, 1973, the charges preferred against Norman E. Andress were deemed cognizable by Respondent by a vote of its members.

On or about October 2, 1973, Fred Hunt, Jr., Respondent's President, appointed a Trial Committee consisting of Henry Rosemont, Charles Derby, George F. Balfo, Stanley Bozenski and Ed. C. Billman, to hear the charges preferred against Norman E. Andress.

On or about October 11, 1973, Respondent, through the Trial Committee, recommended that Norman E. Andress be adjudged guilty of "ratting", and that he be expelled from membership in Respondent Union and be fined the sum of one thousand dollars ($1000.).

At Respondent's Union meeting held on November 25, 1973, which was in part the adjourned session of Respondent's regular October 1973 meeting, Respondent Union, by a vote of its members, adopted the Trial Committee's recommendation that Norman E. Andress be found guilty as charged, and by a vote of its members, adopted the Trial Committee's recommendation that Norman E. Andress be expelled from membership in Respondent Union, and be fined the sum of one thousand dollars ($1000.).

* * * * *

In addition to the foregoing, I find it proper to note the following. The facts reveal that at various times after August 23, 1973, members and officials of the Respondent were told by employees that Andress was actually performing work in the composing room. It is also noted that the charges against

Andress, the trial, and procedures involved, were all in accord with the Union's constitution and by-laws and regular procedures.

Further, it is noted that the word "ratting" is in said union's constitution and by-laws but is not defined. Rosemont, chairman of the trial committee, credibly testified to the effect that "ratting" as involved in the charges against Andress concerned remaining at work in a struck office, as is revealed by the following excerpts from his testimony:

* * * * *

A. You are asking me to define ratting?
Q. Yes, sir.
A. Working for less than the scale in any kind of office, Union or non-Union; remaining at work in a struck office and working in an unfair, non-Union office at the scale, below the scale or above the scale.
Those, all three have been considered ratting during my experience with Union procedures.

* * * * *

Q. Remaining at work while a strike or lockout was on; is that right?
A. That second one?
Q. Yes.
A. That is what we consider the ratting, yes; his offense.
Q. Remaining at work?
A. In a struck office.
Q. Remaining at work behind the picket line?
A. We use struck office and locked out office interchangeably.
Q. Did it make any difference? Is that all that is meant by ratting?
Let us rephrase that.
Is that all that Mr. Andress was charged with under the rubric of ratting?
A. It is all we found him guilty of.

* * * * *

Rosemont further credibly testified that the trial committee worked out their written report and agreed on every word of it

before they adjourned. Such report, dated October 11, 1973, contained the following as revealed by excerpt therefrom.

* * * * *

> We find that Norman Andress has ratted at the Hammond Times, where our members have been picketing since August 23. On questioning of the witnesses it was developed that the defendant pleaded no special circumstances to excuse his remaining at work in the picketed office. In short, we have been unable to discern any extenuating factors whatsoever.

* * * * *

Further, I note that the facts reveal that Andress had an opportunity to appear and participate in the Union's trial procedure but did not do so. At the trial on October 11, 1973, the case against Andress was presented as is revealed by the following credited excerpt from Rosemont's testimony:

> Q. Okay. Now, just tell us what occurred during that part of the meeting during which Mr. Hunt and Mr. Casper were present?
>
> A. Mr. Casper read the charges, of which we already had the copy, of course.
>
> He formalized that by reading them. And as Chairman, I and my colleagues also addressed various questions to the President and to the organizer.
>
> Q. As best as you can recall it, what were those questions?
>
> A. I asked what evidence there was against Mr. Andress which would sustain the charges.
>
> And separately, both of them informed the Committee that they had—the word "hearsay" was used by myself and possibly by one or two of my colleagues on the Committee—but it was only hearsay evidence that Mr. Andress was expediting the mechanical production of the paper which had knocked out our members at the Hammond Times.
>
> Being subsequently pressed for something more substantial than this hearsay, we were informed by both the officers that they could not afford to jeopardize the positions of the ultimate informants, those with whom the information as to Mr. Andress' activities out there originated. And we did not press for that.

* * * * *

> A. Well, after we ended the taking of testimony, if that is the proper term, we made a general discussion, we had a general discussion in which members of the Committee participated with the two officers as to the rights and duties of members in these situations, in strike and lockout situations.
>
> And if you are asking me to elaborate on what was said, then I will be glad to do so.
>
> We were all—I will not say troubled, but we all gave due weight to the fact that there was no ocular evidence on the part of any member on the Committee or either of the witnesses as to direct violation of Union principles on the part of Mr. Andress.
>
> But we did discuss, as a general philosophy, the fact that the conclusion must be drawn against a member who worked behind the picket line and in the utmost secrecy as far as the other members of the Chappel were concerned.
>
> Other members of the Union employed by the Hammond Times were out there at that picket line and he was secreted in the shop for a long period. I have heard in this hearing that it was a month or so, but I understood at the trial that it was more than a couple of weeks anyway, that Mr. Andress was practically a prisoner in the Hammond Times Composing Room.
>
> And I believe someone said, I don't know whether a member of the Committee or one of the officers, that men had been convicted of sedition on less than that. That if they quack like a duck and wobble like one and look like one, then you are a duck.
>
> And that Mr. Andress had chosen to alienate himself and the other members of the Hammond Times Chappel and I must say very reluctantly we came in with a finding, a report of guilty, very sadly and very reluctantly.

H. Vernon M. Palmer

Employer's Representative for Collective Bargaining

There is no dispute, and the facts and pleadings clearly establish, that prior to August 23, 1973, Vernon M. Palmer was a

supervisor of the Employer (Hammond Publishers, Inc.) within the meaning of Section 2(11) of the Act. Further, there is no dispute, and the facts clearly establish that Palmer represented the Employer for purposes of adjustment of grievances.

The Respondent disputes that Palmer was a representative of the Employer at any time for the purpose of collective bargaining, disputes that Palmer was a supervisor or representative of the Employer from August 23 to September 10, 1973, and disputes that Palmer after September 10, 1973, represented the Employer for purposes of collective bargaining or adjustment of grievances.

The pleadings and a composite of the credited testimony of Lewis and Palmer clearly establish that Palmer, prior to August 23, 1973, was a supervisor within the meaning of Section 2(11) of the Act, and that Palmer was a representative of the Employer for purposes of adjustment of grievances. Accordingly, by virtue of such supervisory status and by virtue of the facts relating to Palmer's being an Employer representative for purposes of adjustment of grievances, it is clear, and I conclude and find that Palmer, prior to August 23, 1973, was a supervisor within the meaning of Section 2(11) of the Act, and a representative for collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.[12] It is so concluded and found.

On August 23, 1973, Palmer joined the work stoppage of Hammond Publishers, Inc.'s composing room employees and did not return to work until September 10, 1973. There is no evidence that Hammond Publishers, Inc. discharged or demoted Palmer during such period of time. On the contrary, the facts reveal that Palmer returned to work on September 10, 1973, as a supervisor, was introduced to working employees as their supervisor, and resumed his functions as a supervisor during the period thereafter and was so functioning as of the time of the

12. *Operating Engineers, Local 501 (Anheuser-Busch, Inc.)*, 199 NLRB No. 91.

hearing in this matter on May 7, 1974. During such period of time, Palmer, as a supervisor, adjusted minor grievances brought to his attention by working employees.

Considering the foregoing, I conclude and find that Palmer was a supervisor of Hammond Publishers, Inc., within the meaning of Section 2(11) of the Act and a representative for collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act during the period of time August 23, 1973 to September 10, 1973, and from September 10, 1973 thereafter, and was so at the time of the trial in this matter on May 7, 1974. I find no merit to any contention that Palmer was not a supervisor within the meaning of Section 2(11) of the Act and was not a representative for collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act because he did not work between August 23, 1973, and September 10, 1973. Absent evidence of discharge or demotion, (not present in this case, but with facts otherwise establishing that Palmer had not been discharged or demoted), Palmer's status remained that of a supervisor within the meaning of Section 2(11) of the Act and a representative for collective bargaining and adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. Such retention of status by Palmer is similar to striking employees retaining the status of "employees" while on strike.

I. *Vernon M. Palmer*

Membership in Union

Vernon M. Palmer, as of August 23, 1973, had been a member of the Typographical Union for approximately 22 years. The collective-bargaining agreement between Chicago Typographical Union No. 16 and Hammond Publishers, Inc., (for the term February 1, 1970 through January 31, 1973) required that the foreman of the composing room be a journeyman member of the Union in good standing. The Union's constitution and by-laws

are silent as to how a member can withdraw from the Union excepting when the withdrawal is for reasons of not working at the trade. Hunt, President of the Union, credibly testified to the effect that withdrawal from the Union was accomplished by "death" or by securing a "withdrawal" card because the member is not working at the trade.

The Union's by-laws provide in effect that a "withdrawal" card can not be issued if the member is performing work over which the ITU has jurisdiction.

On September 10, 1973, the Union received the following letter from Vernon M. Palmer:

* * * * *

Vernon Palmer
417 Fayette Street.
Hammond, Indiana

Sept. 9, 1973

Fred Hunt, Jr.
Pres. Chicago Typographical Union #16
529 So. Wabash Ave.
Chicago, Illinois 60605

Dear Mr. Hunt:

I hereby officially notify you that effective today I am resigning my membership in the International Typographical Union. I am enclosing a check for $58.50 which should account for all dues owed and payable up to and including the present date.

In the event you find that this is not the correct amount for my dues please so advise me.

Yours truly,

VERNON PALMER
I. T. U. Reg. No. 25122

cc: John Pilch, Pres.
International Typographical Union
P. O. Box 157
Colorado Springs, Colo. 80901

* * * * *

At the same time Palmer sent and the Union received a "mailgram" to the same effect.

On September 18, 1973, the Union sent the following letter to Palmer:

* * * * *

CHICAGO TYPOGRAPHICAL UNION NO. 16
Oldest Trade Union in Chicago - Organized 1852
529 South Wabash Avenue, Chicago, Illinois 60605
Telephone (312) 939-5738
September 18, 1973

Mr. Vernon Palmer
The Times—c/o Composing Room
417 Fayette Street
Hammond, Indiana 46325

Dear Mr. Palmer:

This is to acknowledge receipt of your Mailgram and letter both dated September 9, 1973 to President Hunt. The Union is also in receipt of your personal check payable to Chicago Typograpical Union No. 16 in the amount of $58.50.

In your letter you advise as follows:

> "I hereby officially notify you that effective today I am resigning my membership in the International Typographical Union. I am enclosing a check for $58.50 which should account for all dues owed and payable up to and including the present date.
>
> In the event you find that this is not the correct amount for my dues please so advise me."

The undersigned has been advised that you are performing composing room work at The Times in Hammond. Please be advised that the ITU has sanctioned The Times lock-out. Please be further advised, yqour action of crossing the picket Line is contrary to Union principles.

As to the matter of your Union dues. The undersigned does not know what the $58.50 represents. Will you supply your check stub from The Times in order that we can determine total earnings, correct amount of dues and ITU assessment number. We will hold your check until you reply.

Not very sincerely,

/s/ DAVE DONOVAN
Dave Donovan
Acting President

cc: Fred Hunt Jr.
John J. Pilch
Jerry J. Musil
Joe Casper Jr.
George R. Duncan
William Vargo

* * * * *

The facts clearly reveal that the Union has construed that Palmer's letter and mailgram of September 9, 1973, did not constitute an effective means of withdrawal of membership.[13]

J. Vernon M. Palmer

Events after August 23, 1973

The facts concerning the Union's work stoppage on August 23, 1973, have been set forth in section E above. As previously indicated, Vernon M. Palmer, the foreman of the composing room (for Hammond Publishers, Inc.), joined in the work stoppage with other union members on August 23, 1973, and remained away from work until September 10, 1973. By September 10, 1973, Palmer, by letter and mailgram, had notified the Union in effect of his "withdrawal" of membership. Thereafter, Palmer resumed work as the composing room foreman, doing his regular duties. The facts relating to his work

13. Some of the testimony and litigation seems to have indicated a union position that the "withdrawal" letter and mailgram were not effective because of a question of the accuracy of dues tendered. The Union's by-laws relating to working at the trade, the September 18, 1973 letter, and Hunt's credited testimony persuade that the question of "withdrawal", that in fact the Union would not allow "withdrawal" while Palmer worked at the trade.

thereafter reveal at most a minimal amount of work performed by Palmer which might be described as nonsupervisory unit work.

K. Restraint and Coercion

Re: Vernon E. Palmer

The following excerpts from a stipulation of the parties reveal Respondent's acts toward Palmer and the Employer.

• • • • •

STIPULATION

It is hereby stipulated and agreed that:

At Respondent's regular union meeting held on September 30, 1973, Respondent instructed Joe Casper, Organizer, to prefer charges against Vernon Palmer.

On or about October 1, 1973, Joe Casper, Organizer, preferred charges against Vernon Palmer for "ratting."

At Respondent's Union meeting held on November 25, 1973, which was in part the adjourned session of Respondent's regular October, 1973 meeting, the charges preferred against Vernon Palmer were deemed cognizable by Respondent by a vote of its members.

On or about November 26, 1973, Fred Hunt, Jr., President of Respondent Union, appointed a Trial Committee, consisting of Henry Rosemont, George F. Balfe, Stanley Bozenski, Charles Derby, and Ed C. Billman, for the purpose of hearing the charges preferred against Vernon Palmer.

On or about December 13, 1973, Respondent, through its Trial Committee, recommended that Vernon Palmer be found guilty of "ratting", and that he be expelled from membership in Respondent Union and be fined the sum of one thousand dolars ($1000).

At Respondent's regular Union meeting held on December 30, 1973, Respondent Union, by a vote of its members, adopted the Trial Committee's recommendation that Vernon Palmer be found guilty as charged, and by a vote of its members, adopted the Trial Committee's recommendation that Vernon Palmer be expelled from membership

in Respondent Union and be fined in the sum of one thousand dollars ($1000).

• • • • •

In addition to the foregoing, I find it proper to note that Hunt's credited testimony clearly reveals that the Union was motivated to act against Palmer because it considered that Palmer's work as a supervisor was "union" work.

I also note, as set forth in section G, that the term "ratting" concerns remaining at work in a struck office.

Conclusions

The Respondent contends that its motivation, in expelling and fining Andress and Palmer, was because each engaged in bargaining unit work. I reject such contention as I am persuaded by the evidence relating to the institution of union proceedings against each, the charges against each, and Hunt's testimony relating thereto, that the Respondent was simply motivated against each because he worked during the time of a union work stoppage. I am persuaded that the totality of the evidence reveals that it made no difference to Respondent whether Andress or Palmer were engaged in bargaining unit work or sunpervisory work. The totality of the facts persuaded that the Respondent did not want any union member (supervisor or not) working for the Employer.[14]

Considering all of the foregoing, I conclude and find that the Respondent was not motivated in its discipline of Andress and Palmer in restraining or coercing the Employer in its section of collective-bargaining representatives or representatives for the adjustment of grievances. Nor am I persuaded

14. To the extent that any witness's testimony might be construed as being that the motivation against Andress or Palmer was pinpointed to the fact that Andress or Palmer was engaged in nonsupervisory work as contrasted to a general motivation against Andress and Palmer simply because they were working, I discredit the same because I am persuaded that the logical consistency of the totality of all the evidence reveals otherwise.

that the Employer, Andress, Palmer, union members, or employees could reasonably construe Respondent's acts of discipline to be so directed (toward restraint or coercion of the Employer in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances).

Rather, the facts in this case simply reveal that Respondent's acts of discipline were designed to keep those it construed subject to its discipline from working during a work stoppage. As to the problems relating to conflict of interests for supervisors in such situation, the United States Supreme Court in its *Florida Power & Light Co.*, case[15] clearly sets forth that Congress addressed itself to such problem, not through Section 8(b)(1)(B), but through a different legislative route.

Thus the Supreme Court set forth:

> • • • • •
>
> The concern expressed in this argument is a very real one, but the problem is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route. Specifically, Congress in 1947 amended the definition of "employee" in § 2(3), 29 U. S. C. § 152 (3), to exclude those denominated supervisors under § 2(11), 29 U. S. C. § 152(11), thereby excluding them from the coverage of the Act. * * *
>
> • • • • •
>
> Thus, while supervisors are permitted to become union members, Congress sought to insure the employer of the loyalty of his supervisors by reserving him the right to refuse to hire union members as supervisors, see *Carpenters District Council of Milwaukee County* v. *N. L. R. B.*, 107 U. S. App. D. C. 55, 274 F. 2d 564 (1959); *A. H. Bull Steamship Co.* v. *National Marine Engineers' Beneficial Assn.*, 250 F. 2d 332 (CA 2 1957), the right to discharge such supervisors because of their involvement in union activities or union membership, see *Beasley* v. *Food Fair of North Carolina, Inc.*, ... U. S. ..... (1974); See also *Oil City Brass Works* v. *N. L. R. B.*,

15. *Florida Power & Light Co.* v. *IBEW*, ... U. S. ....., decided June 24, 1974, reported 86 LRRM 2689.

> 357 F. 2d 466 (CA 5 1966); *N. L. R. B.* v. *Fullerton Publishing Co.*, 283 F. 2d 545 (CA 9 1960); *N. L. R. B.* v. *Griggs Equipment Inc.*, 307 F. 2d 275 (CA 5 1962); *N. L. R. B.* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d CA 6), *cert. denied*, 335 U. S. 908 (1949),[18] and the
>
> right to refuse to engage in collective bargaining with them, see *L. A. Young Spring & Wire Co.* v. *N. L. R. B.*, 82 U. S. App. D. C. 327, 163 F. 2d 905, *cert. denied*, 333 U. S. 837 (1948).

18. It has been held that this right is limited to the extent that an employer cannot discharge supervisory personnel for participation in the union where the discharge is found to interfere with, restrain, or coerce employees in the exercise of their protected rights, see *N. L. R. B.* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (CA 5 1954), or where it is prompted by the supervisors' refusal to engage in unlawful activity, see *N. L. R. B.* v. *Lowe*, 406 F. 2d 1033 (CA 6 1969).

Further, I note that the question as to whether or not Palmer had effectively resigned from the Union before the Respondent's discipline is not material to issues under Section 8(b)(1)(B) of the Act.[16]

In sum, I conclude and find that the facts do not establish that the Respondent has engaged in conduct violative of Section 8(b)(1)(B) of the Act by its conduct directed toward Andress and Palmer.[17]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Chicago Typographical Union No. 16 is and has been at all times material, a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.

16. Since the instant case does not involve a question of alleged conduct violative of Section 8(b)(1)(A), it is not necessary to consider whether Respondent's conduct may be said to be violative because of its effect upon employees who were not sunpervisors.

17. See *Florida Power & Light Co.*, ... U. S. ....., 86 LRRM 2689, decided June 24, 1974.

2. Hammond Publishers, Inc. is engaged in commerce within the meaning of Section 2(2) and 8(b)(1)(B) of the Act.

3. Norman E. Andress and Vernon Palmer, each is and at all times material has been a supervisor within the meaning of Section 2(11) of the Act and a representative of the Employer for the purposes of collective bargaining and for adjusting grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. The facts do not establish that the Respondent has violated Section 8(b)(1)(B) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in the case, I hereby issue the following:[18]

RECOMMENDED ORDER

That the complaints in Cases 13-CB-5060 and 13-CB-5157 be dismissed in their entirety.

Dated at Washington, D. C.

/s/ JERRY B. STONE
Jerry B. Stone
Administrative Law Judge

18. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
* * (Title Omitted in Printing) * *

DECISION AND ORDER.

On July 10, 1974, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the Charging Party and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in answer to the exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge decided the instant case shortly after the Supreme Court's decision in *Florida Power & Light Co.* v. *I. B. E. W., Local 641*, 417 U. S. 790 (1974).[1] The Administrative Law Judge concluded, on the basis of *Florida Power*, that the Respondent had not violated Section 8(b)(1)(B) of the Act by disciplining two of its supervisor-members who worked behind Respondent's picket line during a lawful strike.[2] This conclusion was based on the following findings.[3] The Administrative Law Judge found that the nature

1. The Supreme Court held therein that a union did not violate Sec. 8(b)(1)(B) by disciplining supervisor-members who crossed lawful picket lines to perform rank-and-file struck work.

2. Andress and Palmer, who were both found by the Administrative Law Judge to be 2(11) supervisors and 8(b)(1)(B) representatives, were charged with and found guilty of "ratting" and thereafter fined by and expelled from the Respondent. The Administrative Law Judge concluded, from the credited testimony of one of Respondent's witnesses, that "ratting" concerned remaining at work in a struck office.

3. These findings, while pertinent to the motivational rationale of the dissent, are of no moment under our analysis. We observe, however, as noted *infra*, that these findings are supported by the record.

of the work performed[4] by Andress and Palmer during the work stoppage had not been a factor in Respondent's decision to discipline Andress and Palmer and that, on all the evidence, Respondent's only motivation in imposing the discipline was to "keep those it construed subject to its discipline from working during a work stoppage."[5]

4. Andress, who was characterized by the Administrative Law Judge as "a frank, forthright, and candid witness," testified that his duties as production manager remained the same during the work stoppage as before, and that he did not perform any additional functions in the composing room during this time. He stated that between August 23, 1973, and September 10, 1973, he "put in 22 hours a day" and that during this time he performed at most 35 minutes per day of what might be contended to be composing room work such as going to the file room to get ads and putting some tapes through a reader. Andress stated that he stopped performing even these tasks on September 10, 1973, when Palmer returned to work. Palmer testified, and the Administrative Law Judge found, that he resumed his normal functions as the composing room foreman when he returned to work on September 10, 1973. Palmer testified that he performed several acts in the composing room upon returning to work which, prior to August 23, 1973, were normally performed by unit employees. In respect to these tasks the Administrative Law Judge stated: "The facts relating to his work thereafter reveal at most a minimal amount of work performed by Palmer which might be described as non-supervisory unit work."

5. The dissent would have us believe, under its motivational type analysis of *Florida Power*, that the instant case falls "squarely within the Supreme Court's teaching" or that the instant case "is an exact copy of *Florida Power*." We believe, to the contrary, that even under the dissent's analysis there is a crucial difference between the two cases. In the instant case, both the evidence and the Administrative Law Judge's conclusions establish that the Respondent's acts of discipline toward the supervisor-members herein were not the result of the alleged belief of Respondent that the supervisor-members were performing bargaining unit work. In fact, the Administrative Law Judge held, while discrediting any testimony to the contrary, that "I am persuaded that the totality of the evidence reveals that it made no difference to Respondent whether Andress or Palmer were engaged in bargaining unit work or supervisory work." In contrast to this situation of the instant case, it is apparent to us that the supervisor-members in both *Florida Power* and *Illinois Bell* were disciplined precisely because the unions therein believed that they had performed struck work during the strike. That this is so seems apparent from the decisions of the Board, *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, IBEW (Illinois*

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We believe that the Administrative Law Judge has misinterpreted the Supreme Court's decision in erroneously finding that the Respondent had not violated Section 8(b)(1)(B) of the Act by disciplining Andress and Palmer. We do not read the Supreme Court's decision as turning on a determination of the motivation behinde a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative.[6]

As stated by the Supreme Court:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only *when that discipline may adversely affect the supervisor's conduct* in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. [Emphasis supplied.]

(Continued from preceding page)

Bell Telephone Workers System Council U-4, et al. (Florida Power & Light Company), 193 NLRB 30 (1971) (wherein the Board treated the fines as having been imposed as a result of the supervisors' performance of struck work), the decision of the Circuit in *Illinois Bell*, 487 F. 2d 1143 (C. A. D. C., 1973) (where in the court observed "Section 8(b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be —for performance of rank-and-file struck work"), the decision of the Supreme Court in *Florida Power & Light*, 417 U. S. 790 (1974) (wherein the Court observed "we hold that the respondent unions did not violate Section 8(b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank and file struck work"), and the very words of our dissenting colleague, *infra*, that: "it is the performance of *rank-and-file* functions which gave rise to the issue in *Florida Power*," and also at fn. 19, *infra*. "It should, then, be clear that the performance of the work of the striking member, whether it be sole or partial was the heart of the matter." Given this crucial difference between the two cases, we do not perceive how, even under a motivational analysis, the actions of the Respondent herein can be sanctioned under *Florida Power*.

6. This interpretation is but a recognition of the common law rule that a man is held to have intended the foreseeable consequences of his conduct. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL [A. H. Bull Steamship Company]* v. *N. L. R. B.*, 347 U. S. 17 (1954).

The further question of "when that discipline may adversely affect the supervisor's conduct . . ." clearly depends on an analysis of the activity engaged in by the supervisor during the period for which the discipline is imposed, rather than on an evaluation of the union's motivation. That this is so seems apparent from the Supreme Court's treatment in *Florida Power* of the Board's decision in *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968). By assuming without deciding that *Oakland-Mailers'* fell within the outer limits of its test, the Supreme Court has implicitly recognized that an adverse carryover effect may result where the disciplined supervisor had been engaged in the activity of contract interpretation.[7]

The application of the effect test is relatively straightforward in extreme situations where the disciplined supervisor has engaged either *only* in the performance of supervisory activities (not limited to grievance adjustment or collective bargaining), or *only* in the performance of rank-and-file struck work.[8] In

7. We note that in discussing *Oakland-Mailers'* the Supreme Court recognized that: "the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union."

8. While there is some question whether or not any of the disciplined supervisors in the cases before the Supreme Court in *Florida Power* perform *only* rank-and-file struck work, we believe that the Supreme Court disregarded, for the purpose of its decision, the possibility that some of these supervisors may have performed some supervisory functions during the work stoppage. This follows, we feel, for at least two reasons. First, the decision makes no mention whatsoever that any of the supervisors performed any supervisory functions during any of the disputes. Rather, the decision speaks in terms of supervisors who crossed picket lines to engage in the performance of rank-and-file work. This suggests to us that the amount of supervisory work performed, if any at all, must have been very small and of minor significance in comparison to the unit work performed by the supervisors who were disciplined. Second, the Supreme Court characterized the disciplined supervisors in the cases before it as not being "engaged in collective bargaining or grievance adjustment, or *any activities related thereto, when they crossed* union picket lines during an economic strike *to engage in rankg and file struck work.*" (Emphasis supplied.) This telling

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the former there is clearly a violation since it is reasonably likely that an adverse effect will carry over to the supervisor's performance of his 8(b)(1)(B) duties where he is disciplined after having engaged only in the performance of supervisory duties.[9] In the latter, there is no violation since it is not reasonably likely that an adverse effect will carry over where the supervisor has engaged in the performance of only rank-and-file struck work.[10]

(Continued from preceding page)

factual characterization by the Court does not fit the facts of the instant case. In the instant case, it appears clear to us that Andress and Palmer crossed the picket line to perform supervisory functions and only incidental thereto did they perform a minimal amount of what might arguably be called unit work. They did not, as revealed b ythe very nature of their activities, cross the picket line to engage in rank-and-file struck work.

9. This conclusion appears to be anticipated by both the majority and dissenting opinions in *Florida Power*. At fn. 22, the majority stated, in the course of discussing how the petitioners had exaggerated the dilemma of the supervisor's conflict of loyalities, that: "Those [Illinois Bell supervisors] who did work during the strike but performed only their regular duties were not disciplined by the union. In Florida Power . . . the union did not discipline those who did so [crossed the picked line] only to perform their normal supervisory functions." Mr. Justice White stated, at fn. 2 of the dissent, that: "I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute."

We note with interest the position of the dissent which seems to suggest that there would be no violation of Sec. 8(b)(1)(B), regardless of the activity engaged in by the disciplined supervisor-member, unless the discipline is "directed to the manner in which he performs" his normal functions. It is not altogether clear from the dissent whether the phrase his "normal functions" encompasses the performance of all supervisory duties or only grievance adjustment or collective-bargaining duties. Despite this lack of clarity, it would seem that under the dissent there would be no violation even though the only activity engaged in by the disciplined supervisor-member was that of grievance adjustment or collective bargaining, as long as the union discipline was not directed at the "manner in which he performs those functions." We do not perceive the Supreme Court's opinion as so narrowly limiting Sec. 8(b)(1)(B) of the Act.

10. As stated in *International Brotherhood of Electrical Workers, AFL-CIO [Illinois Bell]* v. *N. L. R. B.*, 487 F. 2d 1143, 1157 (C. A. D. C., 1973):

(Continued on next page)

The instant case, in contrast to these extreme situations, presents a factual setting where the disciplined supervisors performed not only supervisory duties (including grievance adjusting) but also, at least arguably, a minimal amount of rank-and-file struck work during the work stoppage.[11] We believe that the Respondent's acts of discipline in the instant case violated

(Continued from preceding page)

> [W]hen a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. . . . There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties.

11. While the Administrative Law Judge failed to conclude whether Andress or Palmer actually performed any rank-and-file struck work, the record itself reveals that they may have performed, at most, a minimal amount of this work during the work stoppage. See, fn. 4, *supra*. Our dissenting colleague questions the assertion that Andress and Palmer performed at most a minimal amount of rank-and-file work. In support of this skepticism the dissent cites the reduction of the work force from 110 before the work stoppage to 10 immediately after the work stoppage. An examination of Andress' testimony reveals that it is indeed probable that Andress and Palmer performed at most a minimal amount of what might be characterized as rank-and-file work. Andress testified that there were 10 other individuals, in addition to the publisher and himself, working in the composing room immediately following the work stoppage. Of these 10, 3 or 4 were from other departments and were experienced in computer work but not in composing room work. The remaining six to seven were experienced in composing room work by virtue of their employment with other papers owned by Hammond Publications, the parent corporation. Andress further testified that all of these workers worked from 20-22 hours per day. Andress also testified to the elimination of some procedures and the addition of other new procedures and some advanced equipment (some of the computer type) and the development of a newly designed composing room. Some functions were also performed in other areas of Hammond's facilities. On and after September 3, 1973, new employees, some with composing room experience, were interviewed and hired by Andress. Thus, Andress testified that he hired 3 to 4 new employees on about September 3, 1973, and that by mid-December 1973, he had hired around 33 new employees (the original 10 went back to their other jobs).

Section 8(b)(1)(B) notwithstanding the fact that Palmer and Andress may have performed a minimal amount of rank-and-file struck work. This follows, we feel, since under our view of *Florida Power* it makes no difference whether a supervisor performs a minimal amount of struck work because it is still reasonably likely that an adverse effect may carry over to the supervisor's performance of his 8(b)(1)(B) duties when he is disciplined after having performed substantially only supervisory functions and only a minimal amount of what might arguably be called rank-and-file struck work during a work stoppage.

We do not believe that this analysis conflicts in any way with the Supreme Court's treatment of the issue of a supervisor-member's conflict of loyalties. The Supreme Court stated that an employer may not permit a supervisor to become a union member and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and in effect, substitute their services for those of the rank-and-file employees. In this same regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter perform substantial supervisory functions, even though incidental thereto they also arguably perform a minimal amount of rank-and-file struck work.[12]

12. In the words of the majority of the circuit court in *International Brotherhood of Electrical Workers, AFL-CIO* [*Illinois Bell*] v. *N. L. R. B.*, 487 F. 2d 1143, 1169-70 (C. A. D. C., 1973):

> If the employer, however, chooses not to exercise his rights under that section [14(a)], permits his supervisors to join unions . . . the employer cannot still insist on the supervisors' undivided loyalty in *every* union-employer dispute no matter how unrelated the subject of that dispute is to the supervisory function. . . .
>
> This is not to say, of course, that by permitting his supervisors to join unions the employer *completely* waives his right

(Continued on next page)

In sum, due to the fact that these supervisor-members crossed Respondent's picket line and thereatfer performed substantially the same duties as they had done before the strike, which were principally or only supervisory functions (including grievance adjusting), we find that Respondent has violated Section 8(b)(1)(B) of Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Chicago Typographical Union No. 16, Chicago, Illinois, its officers, agents, and representatives, shall:

1. Cease and desist from restraining or coercing Hammond Publishers, Inc., in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances:

(a) By fining, expelling, otherwise disciplining, or attempting by any means to collect or enforce any fine or discipline imposed against any such representative, including Norman E. Andress and Vernon M. Palmer, who performs substantially only supervisory functions for Hammond Publishers, Inc., while Respondent is engaged in a labor dispute with that employer.

(b) By engaging in any like or related conduct constituting such restraint or coercion.

2. Take the following affirmative actions which, we find, will effectuate the policies of the Act:

(a) Rescind and expunge all records of the fine and expulsion levied against Norman E. Andress on November 25, 1973, and against Vernon M. Palmer on December 30, 1973, after they had performed substantially only supervisory functions for

(Continued from preceding page)

to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed for the manner in which they perform their supervisory functions. [Emphasis supplied.]

Hammond Publishers, Inc., while Respondent was engaged in a labor dispute with that employer.

(b) Advise Norman E. Andress and Vernon M. Palmer in writing that the said fines and expulsions have been rescinded and that the records of such fines and expulsion have been expunged.

(c) Post at its business office and meeting hall copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 13 with signed copies of said notice for posting by Hammond Publishers, Inc., if willing, in places where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

HOWARD JENKINS, JR., *Member*

RALPH E. KENNEDY, *Member*

JOHN A. PENELLO, *Member*

(SEAL) National Labor Relations Board

13. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

MEMBER FANNING, dissenting:

The facts of the case, the law as set out in the Supreme Court's decision in *Florida Power*,[14] and the force of reason have all, in turn, been denied their due by the majority. I, therefore, am compelled to dissent.

On August 23, 1973, the employees of the composing room at Hammond Publishers set up a picket line in response to certain changes in working conditions instituted by Hammond.

Immediately prior to the work stoppage, there were approximately 110 employees, all of whom were journeymen, employed in the composing room. Hammond had not hired an apprentice for some 6 years. All the 110 journeymen printers participated in the work stoppage. The following day, Hammond's production manager, Andress, an admitted supervisor with extensive top-level management duties, crossed the picket line and, literally, moved into the composing room. He was joined by approximately 10 other employees, 7 of which Hammond had secured from various other companies within its organization. Of these latter employees, none were even apprentices at the trade. Approximately three had some composing room experience but not in the work over which Respondent has jurisdiction. The record does not detail its exact function, but an essential process in production is performed by the "505 photographic unit." Prior to August 23, only three employees were trained in its operation. Two of those employees were engaged in the work stoppage—the third was Andress. According to his own testimony, it took Andress 2 or 3 weeks of training given by the manufacturer to learn the operation of the 505 in addition to "several months" of concurrent textbook study. The mechanical operation of the machine is, according to Andress, quite

14. *Florida Power & Light Company* v. *International Brotherhood of Electrical Workers, Local 641, 622, 759, 820 and 1263; N. L. R. B.* v. *International Brotherhood of Electrical Workers, AFL-CIO*, 417 U. S. 790 (1974).

simple and can be taught in a matter of moments; however, when problems arise with the machine more extensive knowledge is required.

As to the composing room itself, Andress testified that immediately upon commencement of the picketing:

> All windows were completely sealed; the doors were kept under lock; there was no exit in or out of the composing room unless it was okayed by me getting in or out. There was also, as I said (all the windows were completely blanked over so there was no way of anyone seeing into the composing room what was going on at that particular time. . . . We had a guard at two areas.

These conditions existed at Hammond for the extent of Andress' stay in the composing room.[15] Andress returned to his usual duties on September 10, 1974, when he was replaced by Palmer, the foreman of the composing room. Palmer had participated in the work stoppage from August 23 to September 9.

Both Andress and Palmer testified that while behind the picket line they performed work which normally would have been performed by rank-and-file employees had there not been a strike, *i.e.*, Andress and Palmer, by their own words, admitted performing struck work, albeit they characterized the extent of struck work performed as "minimal."

Although Hammond had sealed off the composing room, various reports from maintenance men and guards filtered down to the Respondent that Andress and Palmer were performing the work of the striking employees. Thus, on four occasions the Respondent was advised that Andress was "running the machine," "working on the 505," and "putting tapes on the machine." On at least eight occasions the Respondent was informed that Palmer was doing the work of the striking employees.

15. With the exception that Hammond began, around September 3, to hire additional replacements. By the time of the hearing, the work stoppage was still in progress and Hammond had hired a total of 33 replacements for the 110 journeyman printers.

Throughout the August 23—September 9 period that Andress worked in the composing room, he had voluntarily maintained his union membership in the face of high-level management responsibilities, so that he would not lose the insurance and mortuary benefits he had accrued while working at the trade. Palmer, as foreman of the composing room, was required to be a union member under the collective-bargaining agreement.[16] Ultimately, both were informed that charges were being brought against them for "ratting." Neither Andress nor Palmer attended his hearing on the charges. Both trial committees were told that both had, according to reports, performed the work of employees engaged in the work stoppage. The record further establishes that both trial committees had expressed concern with the hearsay nature of the charge that Andress and Palmer had performed struck work, but, given their failure to appear, coupled with the secrecy with which their actions were undertaken, little choice remained but to recommend guilty verdicts. Both Andress and Palmer were notified that any defenses they might have offered to the trial committees would not be deemed waived upon their attendance at the union meeting which would consider the trial committees' recommendations. Both Andress and Palmer failed to appear. They were offered the opportunity to appeal. Both Andress and Palmer did not appeal.[17] Both Andress and Palmer were fined $1,000 and expelled from Respondent.

On these facts, the majority finds that Hammond was restrained or coerced in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

This case, in my view, is controlled by *Florida Power*. Because of certain statements made by the majority, it is necessary

16. Immediately prior to crossing the picket line, Palmer attempted to resign from Respondent. The question of the legality of disciplining a member who has attempted to resign from the Union is not in issue in this case. It was neither charged, nor litigated, and, in the words of counsel for the General Counsel, "I want to make it crystal clear this is not General Counsel's theory. General Counsel's theory is the Illinois Bell theory."

17. Palmer, in fact, had refused to sign for the certified mail delivered to him notifying him of the trial committee meeting .

to clarify what that case (and its companion case, *N. L. R. B.* v. *International Brotherhood of Electrical Workers*, and *Local 134, IBEW (Illinois Bell Telephone Company)*, 487 F. 2d 1143), involved. The complaint in *Florida Power* charged the respondent unions with violation of Section 8(b)(1)(B) because the union fined certain supervisors who *"continued* working for Florida Power and crossed Respondent's picket lines as required in order to do so" (emphasis supplied). The case came to the Board on stipulated facts. The stipulation indicated that the fined supervisors "performed bargaining unit work." There was no indication that the supervisors performed "only" bargaining unit work. In point of fact, the Board's original decision in *Florida Power* stated that "the Company's supervisors routinely crossed the picket line during the course of the strike and *performed work, including unit work for the company*.[18]

In the companion *Illinois Bell* case, the supervisors, according to the General Counsel's complaint, "worked *and/or supervised* the performance of work on behalf of the Employer" (emphasis supplied). A hearing was conducted in the case during which all parties stipulated that the fined supervisors "during the same period performed work of a supervisory nature." At least one fined supervisor testified that besides performing rank-and-file work, "I acted in the capacity of a supervisor to other people who were performing work during the strike."

As a point of logic and given the clear, irrefutable facts of both *Florida Power* and *Illinois Bell*, I am at a loss to understand the majority's "doubt" as to whether the supervisors involved performed "only" rank-and-file work. They clearly did not.

What is true about *Florida Power* is that we know neither the extent of the supervisory functions engaged in by the supervisors involved nor the extent of the rank-and-file work they performed, but that lack of knowledge is merely the result of its irrelevance because it was the performance of rank-and-file

18. 193 NLRB 30 (1971). (Emphasis supplied.)

functions which gave rise to the issue in *Florida Power*.[19] It should be apparent, then, that the Board may, in fact, be deciding a case which is an exact copy of *Florida Power* as it relates to the proportion of rank-and-file versus supervisory functions engaged in by some supervisors disciplined therein and yet, anomalously, reaching an opposite result.[20]

Once it is understood that the supervisors in *Florida Power*, beyond a suggestion of doubt, performed rank-and-file struck work and continued in part to perform their supervisory functions behind the picket line, this case falls squarely within the Supreme Court's teaching because the supervisors involved herein were similarly engaged. It is not "arguable" that they performed rank-and-file work, they *admitted* doing it,[21] and like

19. In addressing the so-called dilemma faced by the supervisor-member, the Court did point out that those supervisors who performed *only* their regular duties or normal supervisory functions were not disciplined by the union, 417 U. S. at 812, fn. 22. It should, then, be clear that the performance of the work of the striking member, whether it be sole or partial, was the heart of the matter.

20. The majority is apparently confusing those cases in which the Court issues decisions arguably *broader* than the facts before it with its novel theory that the Court has, indeed is empowered, to issue a decision *narrower* than the facts before it. If the Court could do the latter, it would be, in effect, not deciding the case at all and, as in this case, causing relitigation of the precisely same issues.

21. What is "arguable" is the credibility of the assertion that the extent of the performance of rank-and-file work was "minimal." Why would the Company seal off, completely, the composing room on the first day of the stoppage? Why is it credible to conclude that Hammond's operations could continue at normal output with the performance of but "minimal" rank-and-file work by Andress or Palmer when 110 journeyman printers are engaged in a work stoppage and are replaced with 10 employees, not even apprentices at the trade, only three of whom have any experience? How, during a work stoppage, is the Union supposed to determine whether struck work is actually being performed, let alone gauge the percentage of struck work? What constitutes "minimal" struck work? The Union in this case had clear reason to presume that the only truly experienced workers in the composing room, Andress and Palmer, were performing its members' work, as numerous reports indicated. The majority opinion, in effect, condones failure to appear at the disciplinary hearing as a means of avoiding any legally sufficient justification for the reasonable conclusion that the supervisors have, in fact, performed struck work.

the supervisors in *Florida Power* were disciplined for "working during the strike."[22]

Even were we to assume that all supervisors in *Florida Power* performed more than "minimal" struck work (an assumption that simply cannot be founded on facts), I still would not accept the majority's conclusion that the performance of "minimal" struck work by supervisors is not a legitimate concern of the union and that its discipline of the supervisor for performance of such work is prohibited by Section 8(b)(1)(B). Again, my colleagues emphasize the supervisory tasks engaged in by those disciplined and not the rank-and-file functions they performed during the strike. It is also clear that, on the facts of this case, it was the performance by the supervisors of the work of its members which gave rise to the Union's attempted inquiry and consequent discipline.[23]

22. Although the issue posed in *Florida Power* was whether the respondents therein violated Sec. 8(b)(1)(B) by disciplining those supervisors who performed struck rank-and-file work, it is noted that the supervisors involved were actually notified that the reason for the union's discipline was their "continuing to work during the strike," as the record in that case clearly demonstrates. When those supervisors who worked during the strike took the time to appear before the executive board considering the discipline and testified that although they had worked during the strike they had not performed the work of union members, the respondent therein decided to drop charges. Of course, we do not know whether the same result would have been reached in the instant case because Andress and Palmer did not attend their hearings, but the actual language used to notify them of the reason for the Respondent's attempted inquiry should not lead my colleagues to conclude anything more than that such a fact is further indication of the substantial resemblance of the instant case to the cases involved in *Florida Power*. Counsel for the General Counsel's statement at fn. 16, *supra*, is most interesting on this point given the fact that *Illinois Bell* was ultimately to be overruled.

23. The Administrative Law Judge concluded that Respondent was motivated against Andress and Palmer because "they worked during the strike." While that may, in fact, be the case, I see no reason why such a conclusion compels a different result. In any events, it is clear to me that Andress' and Palmer's performance of the work of Respondent's members led directly to the initiation of disciplinary proceedings. That fact is substantiated by the numerous

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There can be no relevance to the proportion of rank-and-file to supervisory functions performed by a supervisor during a strike when the question of equity, a basic thrust of the Supreme Court's decision, is considered. Whether supervisors perform 80 percent, 30 percent, or 10 percent rank-and-file work, their actions are equally antithetical to the interests of the union whose membership benefits they simultaneously enjoy. Even apart from the monumental burden the majority imposes upon a union's capacity to protect its substantial interest in strike solidarity by requiring it to overcome the naked assertion of "minimal" rank-and-file activity (as opposed to requiring the General Counsel to overcome the *prima facie* validity of the discipline where rank-and-file activity has been performed), I would dismiss the complaint herein on the basis of *Florida Power.*[24]

(Continued from preceding page)

instances in the record demonstrating that Respondent's members were upset with Andress' and Palmer's performance of "union" work. Hunt's testimony, upon which the Administrative Law Judge relied, is additional evidence of that view. The Administrative Law Judge discredited testimony which might be "construed as being that the motivation against Andress and Palmer was *pinpointed* to the fact" that they had engaged in rank-and-file work, but it should be obvious that the Administrative Law Judge's interpretation of *Florida Power* did not require an inquiry into whether the Respondent was motivated against these supervisors because they merely "worked" or "performed unit work" but rather only whether the Respondent was motivated against them in an attempt to influence their particular grievance adjustment or collective-bargaining functions. In that sense, the Administrative Law Judge's finding is in the realm of *arguendo.* Whatever the Union's motivation, the fact remains that these supervisors were fined by their Union "for continuing to work" for their Employer and they performed rank-and-file work. The same is true of the supervisors in *Florida Power.*

24. Because these supervisors admittedly performed rank-and-file struck work, I need not consider the validity of the majority's conclusion that a supervisor engaged solely in supervisory duties cannot be disciplined for working during a strike. While recognizing that such a factual setting is one left open by the Supreme Court in *Florida Power,* I do note that many of the considerations which went into the Court's decision are equally pertinent in such a fact pattern, and that the principle of law to be applied remains, in the Court's

(Continued on next page)

Dated, Washington, D. C., Mar. 6, 1975.

JOHN H. FANNING, *Member*
National Labor Relations Board

(Continued from preceding page)

words, "that a union's discipline of one of its members who is a supervisory employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer."

I further note that to the extent a fine, threat of fine or explusion, the union's bylaws setting forth the membership obligation to observe picket lines, or a picket line itself, may operate to restrain a supervisor-member from reporting to work during the strike to perform his normal functions, such restraint cannot be said to be directed to the manner in which he performs those functions. Although it is true that the restraint may well deprive the employer of the services of the supervisor during the strike if the supervisor resolves the problem of conflicting loyalties by observance of the picket line, this would seem to be a problem "Congress addressed, not through 8(b)(1)(B), but through a completely different legislative route" See my dissent in *Daily Racing Form, a Subsidiary of Triangle Publications, Inc.,* 216 NLRB No. 147.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT restrain or coerce Hammond Publishers, Inc., in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances:

(a) By fining, expelling, otherwise disciplining, or attempting in any manner to collect or enforce any fine or discipline heretofore imposed against any such representative, including Norman C. Andress and Vernon M. Palmer, who performed substantially only supervisory functions for Hammond Publishers, Inc., while Respondent was engaged in a labor dispute with that employer.

(b) By engaging in any like or related conduct constituting such restraint or coercion.

WE WILL rescind and expunge all records of the fine and expulsion levied by us against Norman E. Andress on November 25, 1973, and against Vernon M. Palmer on December 30, 1973, after they had performed substantially only supervisory functions for Hammond Publishers, Inc., while Respondent was engaged in a labor dispute with that employer, and WE WILL notify the above-named men, in writing, that we are rescinding and expunging such records.

CHICAGO TYPOGRAPHICAL UNION No. 16
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312—353-7572.

UNITED STATES COURT OF APPEALS,
For the District of Columbia Circuit.

* * (Title Omitted in Printing) * *

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before: MCGOWAN, ROBINSON and WILKEY, *Circuit Judges*.

JUDGMENT

This cause came on for consideration on a petition for review and cross-application for enforcement of an order of the National Labor Relations Board and briefs were filed by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review herein is hereby affirmed, on the basis of the Board's opinion in this case, reported at 216 NLRB No. 149, 88 LLRM 1378.

Per Curiam

For the Court
/s/ GEORGE A. FISHER,
George A. Fisher,
Clerk.

JD-489-74
Chicago, Ill.

UNITED STATES COURT OF APPEALS,
For the District of Columbia Circuit.

No. 75-1320 — September Term, 1975

CHICAGO TYPOGRAPHICAL UNION, NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

HAMMOND PUBLISHERS, INC.
Intervenor.

Before: MCGOWAN, ROBINSON and WILKEY, *Circuit Judges*.

ORDER.

On consideration of the petition for rehearing filed by petitioner Chicago Typographical Union, it is

ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam

For the Court:
/s/ GEORGE A. FISHER,
George A. Fisher,
Clerk.

Not to be Published—See Local Rule 8(f)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-688

CHICAGO TYPOGRAPHICAL UNION NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HAMMOND PUBLISHERS, INC.,
Intervenor.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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TABLE OF CASES.

CONSTITUTIONAL PROVISIONS AND STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-688.

CHICAGO TYPOGRAPHICAL UNION NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HAMMOND PUBLISHERS, INC.,
Intervenor.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Intervenor, Hammond Publishers, Inc., hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

OPINIONS BELOW.

The Decision of Administrative Law Judge Jerry B. Stone (Pet. App. A1-A24) was entered July 10, 1974.

The Decision and Order of the National Labor Relations Board (Pet. App. A25-A43), reported at 216 NLRB 903 was entered on March 6, 1975.

The Judgment, without opinion, of the Court of Appeals for the District of Columbia (Pet. App. A44) was entered on June 21, 1976. An Order of said Court of Appeals (Pet. App. A45) denying rehearing was entered on August 18, 1976.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does a labor organization violate Section 8(b)(1)(B) of the Labor-Management Relations Act, Title 29, United States Code, Section 158, by disciplining supervisor members for crossing a picket line to perform supervisory functions (including grievance adjustment)?

2. Is it an unconstitutional interpretation and application of the Labor-Management Relations Act to hold that a labor organization may not discipline a member who is a supervisor within the meaning of the Act for crossing a picket line to perform supervisory functions (including grievance adjustment)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendment I:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble. . . .

Title 29, United States Code, Section 158(b)(1)(B):

> It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. . . .

Title 29, United States Code, Section 164(a):

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

COUNTERSTATEMENT OF THE CASE.

The Intervenor herein, Hammond Publishers, Inc. (hereinafter referred to as the "Employer") filed an unfair labor practice charge against the Petitioner, Chicago Typographical Union No. 16 (hereinafter referred to as the "Union"). Pursuant to the aforesaid charge, Respondent, the National Labor Relations Board (hereinafter referred to as the "Board"), found the Union violated Section 8(b)(1)(B) of the Labor-Management Relations Act (hereinafter referred to as the "Act") by disciplining two of its supervisor members who crossed its picket line during a strike to perform substantially only supervisory functions, including the adjustment of grievances.

The Union struck[1] the Employer in support of the Union's demands at the bargaining table. In the course of that dispute, the Union disciplined two supervisor members[2] for crossing the Union picket line and working during the strike, performing substantially only their supervisory duties. Thereafter the Union put in motion procedures resulting in the fining and expulsion from Union membership of the two supervisors.

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1. Petitioner misrepresented the work stoppage as a "lockout" (Pet. 4). The Board found the Union was engaged in a strike (Pet. App. A25).

2. At all times material, as both the Board and Administrative Law Judge found, both individuals were supervisors within the meaning of Section 2(11) of the Act and representatives for grievance adjustment within the meaning of Section 8(b)(1)(B) of the Act (Pet. App. A5-6, A15, A25).

The Administrative Law Judge recommended that the Complaint against the Union be dismissed because its motivation in imposing the discipline was to require the two supervisor members, along with its rank-and-file employee members, to withhold any and all work during the work stoppage.

The Board (Member Fanning dissenting) overruled the findings of its Administrative Law Judge and found that the Union violated Section 8(b)(1)(B) of the Act by disciplining the two supervisor members who crossed its picket line to perform substantially only supervisory functions, concluding that the reasonable effect of the discipline would be to adversely affect the supervisors' activities as Section 8(b)(1)(B) representatives. In reaching the conclusion the Board noted that the work being performed in fact during all times relevant herein by the two supervisors was principally or only supervisory functions (including grievance adjusting); there was no basis in fact for the Union's imposition of discipline other than the supervisors working behind a picket line; there was no evidence in the record to support the proposition that the Union could have reasonably believed that either supervisor was in fact performing rank-and-file struck work.

The Court of Appeals for the District of Columbia Circuit affirmed the decision of the Board and, thereafter, denied Petitioner's request for a rehearing.

ARGUMENTS AGAINST GRANTING WRIT.

I.

A Finding That a Union Violates Section 8(b)(1)(B) of the Act by Disciplining Supervisor Members Who Cross Its Picket Line to Perform Substantially Only Supervisory Functions Is Consistent with and Mandated by the Decision in Florida Power & Light Co.

Accepting Petitioner's contention that the central issue raised by its Petition is the scope and meaning of this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of*

Electrical Workers, 417 U. S. 790 (1974), it is clear that the Board and the Court of Appeals disposed of the instant case in a manner not merely consistent with but in a manner fully supported by that decision.

In *Florida Power & Light Co.*, this Court held that a union does not violate Section 8(b)(1)(B) of the Act by disciplining supervisor members for performing rank-and-file work during a strike. This Court made it clear, however, that there is a definite cleavage between supervisory work and rank-and-file work, stating:

> The question to be decided is whether the unions committed unfair labor practices under § 8(b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and *performing rank-and-file struck work* during lawful economic strikes against the companies. (Emphasis added.) 417 U. S. at 792.

The basis of this Court's decision was made even clearer when it stated:

> The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer. 417 U. S. at 804-805.

The instant case, of course, does not involve the fining of supervisor members for crossing a picket line and performing rank-and-file work. It involves the fining of supervisory personnel for crossing a picket line to perform their supervisory functions.

It is apparent that *Florida Power & Light Co.* did not disturb the substantial body of law prohibiting a union from disciplining supervisor members for performing supervisory or management functions. To fully appreciate this fact, a brief review of the decision of the Board in *San Francisco-Oakland Mailers' Union*

No. 18, 172 NLRB 2173 (1968), and that of the U. S. Court of Appeals for the District of Columbia in *Meat Cutters Union Local 81* v. *NLRB*, 458 F. 2d 794 (1972), is necessary.

In *Oakland Mailers*, *supra*, three supervisor members were fined and expelled from the union for allegedly assigning work in violation of the contract. Despite the absence of direct pressure or coercion by the Union directed at securing the removal or replacement of the supervisors, the Board held that the union violated Section 8(b)(1)(B) because it was obvious that the effect of the union's conduct was to influence the manner in which the supervisors interpreted their contractual powers to assign work in the future. The Board considered it irrelevant that the union sought the substitution of attitudes instead of persons, observing: "Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

In *Meat Cutters Union Local 81* v. *NLRB*, *supra*, the court affirmed the Board's decision that a union which fined a supervisor member because he carried out his employer's orders to procure certain meat products in prepared form in defiance of a union directive to the contrary violated Section 8(b)(1)(B) and stated:

> The Union in the instant case fined and expelled Supervisor Hall in retaliation for his performance of duties indigenous to his position as a management representative.[12] 458 F. 2d at 798.

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12. . . . The rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, *because he has performed duties as a management representative*. 458 F. 2d at 798-799 n. 12. (Emphasis added.)

This, of course, is precisely what occurred in this case. Here both supervisors were disciplined because they crossed the Union's picket line to perform their duties as management repre-

sentatives. How after all could they perform such duties if they did not cross the picket line?

In ruling in *Florida Power & Light Co.* that a union does not violate Section 8(b)(1)(B) by disciplining supervisor members for performing rank-and-file work during a strike, this Court did not hold that such cases as *Oakland Mailers* or *Meat Cutters* were decided wrongly. *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U. S. at 801-803. To the contrary, this Court agreed with the U. S. Court of Appeals for the District of Columbia view that:

> Section 8(b)(1)(B), the [District of Columbia Appeals] court held, was intended to proscribe only union efforts to discipline supervisors for their actions in representing management in collective bargaining and the adjustment of grievances. It was the court's views that *when a supervisor forsakes his supervisory role to do work normally performed by nonsupervisory employees, he no longer acts as a managerial representative and hence "no longer merits any immunity from discipline." Florida Power*, 417 U. S. at 797. (Emphasis added.)

This Court also stated:

> *We agree with the Court of Appeals* [for the District of Columbia] *that Section 8(b)(1)(B) cannot be so broadly read*. 417 U. S. at 803. (Emphasis added.)

This Court also noted that it could "assume without deciding that the Board's *Oakland Mailers'* decision fell within the outer limits of [*Florida Power & Light Co.*]." 417 U. S. at 804.

Finally, Mr. Justice White, joined in his dissenting opinion by the Chief Justice, Mr. Justice Blackmun and Mr. Justice Rehnquist, stated:

> I do not read the Court to say that § 8(b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work during a labor dispute. 417 U. S. at 815, n. 2.

In short, this Court held that union discipline of a supervisor member violates Section 8(b)(1)(B) if it may adversely affect the supervisor's conduct in performing his 8(b)(1)(B) functions, but found no such adverse effect where supervisor members were disciplined for performing rank-and-file struck work. While not presented with the issue, this Court also made it clear, especially by its approval of the *Oakland Mailers'* decision, that the disciplining of a supervisor member for crossing a picket line to perform his supervisory duties would have such an adverse effect. Thus, it is clear that the decision of the Board and Court of Appeals in the instant case is consistent with and supported by the *Florida Power & Light Co.* decision.

Petitioner states that the Board's decision in this case runs directly counter to the decision in *NLRB* v. *San Francisco Typographical Union, Local 21*, 486 F. 2d 1347 (9th Cir. 1973). In *San Francisco Typographical Union, supra*, the Court held that "Section 8(b)(1)(B) does not prevent unions from fining supervisors who perform rank-and-file work behind a picket line." 486 F. 2d at 1350. The Court also held, however, that the union violated Section 8(b)(1)(B) when it disciplined a supervisor member for performing his supervisory duties (discharging an employee violating company rules). 486 F. 2d at 1349. Hence, Petitioner's reliance is misplaced, for the holding is consistent with its analysis set forth above and actually supports the Court of Appeals' and Board's decisions.

Finally, the recent decision in *American Broadcasting Companies, Inc.* v. *NLRB*, ____ F. 2d ____, 93 LRRM 2958 (2d Cir. 1976) (reported after the filing of Petitioner's Petition for a Writ of Certiorari), affords no basis for a review of the instant decision. There in a *per curiam* opinion, the rationale of which is unexplicated, the Court denied enforcement of a Board Decision and Order finding that a labor organization violated Section 8(b)(1)(B) when it fined and otherwise disciplined certain supervisor members for crossing a picket line to perform their normal work. Judge Moore dissented and would have granted

enforcement based upon the analysis of *Florida Power & Light Co.* set forth in the instant brief.

It is the Intervenor's position that *American Broadcasting Companies, Inc.*, is simply and obviously wrong. The fact that a contrary and erroneous holding was made in that case does not offer the slightest reason for a review of the instant case, which is clearly consistent with this Court's decision in *Florida Power & Light Co.*

In short, the decision of the Board enforced by the D. C. Circuit that Petitioner violated Section 8(b)(1)(B) of the Act by disciplining supervisor members for crossing a picket line to perform supervisory functions, including grievance adjustment, is both consistent with and mandated by the decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, supra.*

II.

The Instant Decision Raises No Question Concerning the Extent of Limitation of the Constitutional Right of Free Assembly by the Taft-Hartley Amendments.

Petitioner suggests that the Board's Decision and Order in the instant case represent an unconstitutional interpretation and application of the Labor-Management Relations Act. Authority for this proposition is purportedly derived from *NLRB* v. *News Syndicate Co.*, 365 U. S. 695 (1961); *NLRB* v. *Edward G. Budd Manufacturing Co.*, 169 F. 2d 571 (6th Cir. 1948); *cert. denied*, 335 U. S. 908 (1949); and *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653 (1974). These cases neither stand for nor lend support to Petitioner's proposition.

The relevance of these three cases to the instant case is the fact, undisputed herein, that:

> [W]hile supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors [and] [citations

> omitted] the right to discharge such supervisors because of their involvement in union activities or union membership .... *Florida Power*, 417 U. S. at 808, 94 S. Ct. at 2746, citing *NLRB* v. *Edward G. Budd Mfg. Co., supra*, and *Beasley* v. *Food Fair of North Carolina, Inc., supra*.

None of these cases suggest, however, that because the employer permits supervisors to retain union membership that they are subject to union discipline for *every* action they take which their union construes as contrary to its interest.

In short, Petitioner has not shown what evidence in the record gives rise to its unfounded assertion that "constitutional rights of free speech and assembly" will be interfered with if the instant decision is allowed to stand, nor has it cited any pertinent legal authority in support of its position.

CONCLUSION.

For the above reasons, the writ of certiorari should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-688

CHICAGO TYPOGRAPHICAL UNION NO. 16,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HAMMOND PUBLISHERS, INC.
Intervenor.

SUPPLEMENTAL BRIEF IN SUPPORT OF GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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SUPPLEMENTAL BRIEF IN SUPPORT OF GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Intervenor, Hammond Publishers, Inc., upon reconsideration, hereby files its support for granting the writ of certiorari in the above-captioned matter.

ARGUMENTS IN SUPPORT OF GRANTING WRIT.

In Light of the Recent Grant of Certiorari in a Related Case, Certiorari Is Both Necessary and Desirable for a Full and Proper Determination of the Legal Issues.

The Intervenor has reconsidered its previous opposition to the writ in light of the Court's recent grant of certiorari in *American Broadcasting Companies, Inc.* v. *Writers Guild of America, West, Inc.*, No. 76-1121, *cert. gtd.* April 20, 1977. The Intervenor now urges that certiorari be granted in order to assure a full and proper determination of the legal issues.

First, certiorari is necessary in order to assure a full consideration of divergent factual patterns. For example, the situation in the instant case differs from *American Broadcasting Companies, Inc.*, as to the amount of bargaining unit work performed by the supervisor-members. If this crucial factual difference is to be treated properly, the Court must hear argument regarding this common variation in fact patterns.

Second, certiorari is necessary in order to assure that the legal issues will be analyzed in the most common industrial context in which they arise. The entertainment industry context in which *American Broadcasting* occurred is atypical with respect to the central issue because of the unique role and great number of the hyphenate supervisor-members. If the basic issue is to be considered in a more typical industrial context, certiorari must be granted in the instant case.

Third, certiorari is desirable because the NLRB's decision in the instant case has clearly emerged as the leading decision on the point at issue. The decision in the instant case is cited as support for the Board's subsequent opinion in *American Broadcasting*. Moreover, the Board itself has already cited the instant case more than thirty times, whereas *American Broadcasting* has been cited only once. It would be highly advantageous for the Court to hear argument with respect to the leading case on the question presented.

Fourth, certiorari is necessary if the Petitioner's legal interests are to be adequately represented. Because of the divergent factual patterns and industrial contexts, Petitioner's interests may be jeopardized if all of the relevant dimensions are not fully explored. Full protection of the Petitioner's legal interests requires that the Court grant certiorari in the instant case.

CONCLUSION.

For the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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CHICAGO TYPOGRAPHICAL UNION NO. 16, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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JOHN S. IRVING,
General Counsel,
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In the Supreme Court of the United States

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. In August 1973, when agreement on a new contract was not reached, a work stoppage began at the Company's[1] composing room (Pet. App. A7). Company supervisors Norman Andress and Vernon Palmer were both members of petitioner Union (Pet. App. A6-A7, A15-A19). They crossed the Union's picket lines and continued to perform their supervisory functions, including grievance adjustment (Pet. App. A26). Both also performed a minimal amount of rank-and-file composing room work (Pet. App. A30). The Union subsequently fined both Andress and Palmer $1,000 and expelled them from the Union for working during the work stoppage (Pet. App. A10, A20-A21). The Board

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[1]Hammond Publishers, Inc., the charging party before the Board and an intervenor in the court of appeals.

(Member Fanning dissenting) held that the Union discipline violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), which prohibits a union from restraining or coercing an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances (Pet. App. A25-A43). The Board entered an appropriate order (Pet. App. A32-A33). The court of appeals enforced the Board's order without opinion (Pet. App. A44).

2. The basic question presented is whether a union violates Section 8(b)(1)(B) of the National Labor Relations Act by disciplining supervisor-members who represent management in grievance adjustment or collective bargaining for crossing union picket lines to perform supervisory functions during a work stoppage. The same basic question is presented in *American Broadcasting Companies, Inc.* v. *National Labor Relations Board*, and *National Labor Relations Board* v. *Writers Guild of America, West, Inc.*, Nos. 75-4089, 75-4121 (hereafter *Writers Guild*), decided November 22, 1976, where the Second Circuit reached a conclusion contrary to that of the court of appeals in the present case. The Board intends to file a petition for a writ of certiorari to review the decision in *Writers Guild*.[2]

3. In view of the foregoing, the Board does not oppose the granting of the petition in the present case and suggests

[2]A petition has already been filed by the companies. *American Broadcasting Companies* v. *Writers Guild of America, West, Inc.*, No. 76-1121, filed February 14, 1977.

that the case be set down for argument along with *Writers Guild*.[3]

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

FEBRUARY 1977.

[3]This would enable the Court to consider the issue in all of its dimensions. While the supervisors here performed a minimal amount of rank-and-file work during the work stoppage, the supervisors in *Writers Guild* performed only supervisory work.